

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

BEAR TOOTH MOUNTAIN HOLDINGS LP et)
 al.,)

Appellants,

v.

ML MANAGER LLC et al.,)

Appellees.)

Case No. 2:13-cv-01734-RCJ
 Adv. No. 2:12-ap-01849-RJH

ORDER AND OPINION

This is an appeal of an adversary proceeding that arises out of the alleged malfeasance of ML Manager, LLC, a company created under the Confirmation Order in the bankruptcy case of Debtor Mortgages, Ltd. Fifteen Plaintiffs (“Appellants”) sued ML Manager and several of its members and officers (collectively, “ML Manager” or “Appellees”) in Arizona state court on state law claims of breach of fiduciary duty, negligence, conversion, fraud, intentional and negligent misrepresentation, civil conspiracy, and breach of the implied covenant of good faith and fair dealing. Defendant removed under 28 U.S.C. § 1334(b). The Bankruptcy Court denied Appellants’ motion to remand, finding that the claims had a “close nexus” to the bankruptcy case, as required for post-confirmation § 1334(b) jurisdiction under *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1194 (9th Cir. 2005), because the claims essentially complained of the way the Confirmation Plan was drafted, negotiated, amended, and confirmed; how the exit financing was obtained; how ML Manager’s board operated; how the troubled real estate assets were liquidated by ML Manager under

1 the Confirmation Plan; and the assertion of agency authority assigned to ML Manager by the
2 Confirmation Plan. The Bankruptcy Court dismissed all claims except those for fraud and negligent
3 misrepresentation based on claim preclusion, dismissed all claims except that for fraud based on
4 quasi-judicial immunity, and found the fraud claim not to have been pleaded with particularity. The
5 Bankruptcy Court later dismissed the amended fraud claim with prejudice.

6 Appellants appealed, and Appellees elected to have the appeal heard by this Court rather than
7 the Bankruptcy Appellate Panel. Appellants asked the Court to certify the case for direct appeal to
8 the Court of Appeals. The Court granted the motion, but the Court of Appeals exercised its
9 discretion to refuse jurisdiction. The appeal is now ripe for this Court's determination. Appellants
10 assign four points of error to the Bankruptcy Court: (1) there is no jurisdiction under § 1334(b); (2)
11 claim preclusion does not bar any of the claims; (3) ML Manager is not entitled to quasi-judicial
12 immunity; and (4) the fraud claim was adequately pled in the First Amended Complaint ("FAC").

13 **I. POST-CONFIRMATION JURISDICTION**

14 The Bankruptcy Court did not err in finding jurisdiction under § 1334(b). The Court of
15 Appeals has reiterated that post-confirmation "related-to" bankruptcy jurisdiction exists under the
16 "close nexus" test over "matters 'affecting the "interpretation, implementation, consummation,
17 execution, or administration of the confirmed plan.'"" *In re Wilshire Courtyard*, 729 F.3d 1279,
18 1287 (9th Cir. 2013) (quoting *In re Pegasus Gold Corp.*, 394 F.3d at 1194 (quoting *binder v. Price*
19 *Waterhouse & Co. (In re Resorts Int'l Inc.)*, 372 F.3d 154, 166–67 (3rd Cir. 2004))). The acts
20 complained of here concern ML Manager's execution and administration of the Confirmation Plan,
21 i.e., the liquidation of the assets of Debtor's estate. Appellants essentially argue that ML Manager
22 was not administering or executing the Confirmation Plan when it engaged in the complained-of acts
23 because the Confirmation Plan did not direct ML Manager's specific actions. But the detail of the
24 Confirmation Plan's instruction to ML Manager is not relevant, so long as it is clear ML Manager
25 was acting within the scope of the Confirmations Plan, which is not seriously disputed. An actor
26 does not act outside the scope of a plan simply because a bankruptcy court has given him a wide
27 range of discretion in how he carries out the tasks and objectives listed in the plan. That is not to say
28 that ML Manager may not have abused that discretion or acted wrongly, but it is to say that

jurisdiction over such claims is supported by § 1334(b).

II. CLAIM PRECLUSION

Appellants argue that a recent ruling by the Court of Appeals invalidates the Bankruptcy Court's claim preclusion rationale. The Bankruptcy Court noted that certain claims or issues were precluded: (1) ML Manager could charge all investors an equitable portion of the exit financing costs and could manage the loans and collateral but could not involuntarily encumber non-consenting parties' beneficial interests; (2) Appellants were bound by certain agency agreements with Debtor to which ML Manager had succeeded and which could not be revoked because the agencies were coupled with an interest; (3) the allocation of exit financing had been approved, affirmed by this Court, and found equitably moot by the Court of Appeals; and (4) many previous sales orders had been approved by the Bankruptcy Court, affirmed by this Court, and found equitably moot by the Court of Appeals.

Appellants note that the Court of Appeals has reversed as to the agency issue. *See In re Mortgages, Ltd.*, 771 F.3d 623, 630 (9th Cir. 2014). The Court of Appeals held that Appellants in that case had sufficiently alleged a lack of any signed agency agreements such that the Bankruptcy Court erred in dismissing under Bankruptcy Rule 7008(a), but it did not hold that there was in fact no agency as a matter of law. *See id.* It remanded for further proceedings. *See id.* at 632. Appellants are correct that the issue is no longer precluded by virtue of the now-reversed ruling. However, the issue may still be precluded by the other rulings noted above. Appellants note that the Court of Appeals refused to review those rulings as equitably moot and argue that the unavailability of appellate review can in some cases undermine the confidence in the correctness of a ruling such that it should not be given preclusive effect. In this case, however, even assuming that the unavailability of appellate review due to equitable mootness of the issue weakens the preclusive value of the relevant rulings, the Bankruptcy Court ruled on the preclusion issue before the Court of Appeals announced that it would not review the issues based on equitable mootness. The Bankruptcy Court therefore cannot have erred in refusing to find claim preclusion, because it did not know when it ruled that the underlying issues would be held unreviewable on appeal. And this Court cannot readdress the underlying issues now. The Court of Appeals has noted in another opinion that despite the equitable

mootness issue it would be inequitable to permit Appellants to relitigate the underlying issues of the agency agreements and exit financing. *See In re Mortgages, Ltd.*, 771 F.3d 1211, 1213, 1218 n.5 (9th Cir. 2014).

III. QUASI-JUDICIAL IMMUNITY

Bankruptcy trustees are entitled to broad immunity from suit when acting within the scope of their authority and pursuant to court order. Additionally, court appointed officers who represent the estate are the functional equivalent of a trustee.

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For derived quasi-judicial immunity to apply, the defendants must satisfy the following four elements: (1) their acts were within the scope of their authority; (2) the debtor had notice of their proposed acts; (3) they candidly disclosed their proposed acts to the bankruptcy court; and (4) the bankruptcy court approved their acts.

In re Harris, 590 F.3d 730, 742 (9th Cir. 2009) (citations and internal quotation marks omitted). The Bankruptcy Court did not err in finding these elements to apply. ML Manager's activities were within the scope of its authority to dispose of assets, the Debtor had notice of the acts (the property sales, exit financing, etc.), and the acts were both disclosed to and approved by the Bankruptcy Court. As the Bankruptcy Court noted in its dismissal order, Appellants did not contest the latter three elements, but only the first, and the Bankruptcy Court did not err in finding that ML Manager was functionally equivalent to a trustee.

IV. RULE 9(b)

The 32-page FAC contains a single claim for fraud. (*See* First Am. Compl. 29, ECF No. 20-1). The general allegations in the FAC concern various complaints about the internal operations and communications of the board of ML Manager, but nowhere in the FAC is there any allegation of any untrue statement of fact (or concealment) to any Appellant by any Appellee, unknown to the Appellant to be false, and reasonable reliance thereupon by the Appellant to his detriment. *See Nielson v. Flashberg*, 419 P.2d 514, 518–19 (Ariz. 1966). The allegations of fraudulent concealment concern the alleged concealment of certain financial problems of ML Manager in 2010, resulting in ML Manager taking over \$1 million in new loans unapproved by the Bankruptcy Court. Pursuant to a “secret forbearance agreement” with the lender not revealed to the Bankruptcy Court or the beneficiaries of the loans, ultimately cost ML Manager \$2.2 million. ML Manager then conducted

1 “fire sales” on the troubled real estate assets to quickly generate enough money to repay the new
2 principle borrowed from the exit financing lender.

3 The Court finds that the Bankruptcy Court did not err in ruling that Appellants failed to plead
4 causation, reliance, or damages under Rule 8(a) and that it is therefore not relevant whether they
5 were required to plead those elements under Rule 9(b). At oral argument in the Bankruptcy Court,
6 Appellees argued that Appellants had not alleged they would have done anything in particular had
7 they known of the additional financing, so they could not show reasonable reliance and causation as
8 opposed to mere speculation. There is no allegation of what Appellants would have done had they
9 known of the complained of acts by ML Manager or how their failure to take those acts might have
10 caused them damage. The bankruptcy judge’s comment at oral argument that the allegation of
11 reliance in paragraph 151 of the FAC was conclusory under *Iqbal* and *Twombly* was correct.
12 Appellants then pointed the Bankruptcy Court to paragraph 200, which alleges that the concealment
13 prevented Appellants from being able to appose an allocation motion with full knowledge of material
14 facts, implying that they would have done so. But when pressed by the bankruptcy judge to point out
15 any allegation of resulting damages apart from the conclusory statement of damage in paragraph 206,
16 which includes no figure or even method of calculation, Appellants were unable to do so. Also, the
17 Bankruptcy Court noted that even in the absence of the forbearance agreement (or if Appellants had
18 knowledge of the forbearance agreement), ML Manager (or the exit financing lender, via
19 foreclosure) would have sold the properties quickly at large losses anyway, because liquidating the
20 assets was ML Manager’s entire purpose and the market had crashed, and Appellants had not alleged
21 otherwise in the FAC.

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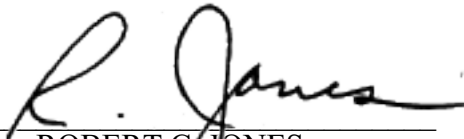
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CONCLUSION

IT IS HEREBY ORDERED that the Orders of the Bankruptcy Court are AFFIRMED, and the Clerk shall close the case.

IT IS SO ORDERED.

Dated this 25th day of June, 2015.



ROBERT C. JONES
United States District Judge